



# DEPARTMENT OF JUSTICE

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## **THE COMMON LAW APPROACH AND IMPROVING STANDARDS FOR ANALYZING SINGLE FIRM CONDUCT**

**Address by**

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**Before the**

**Thirtieth Annual Conference on  
International Antitrust Law and Policy  
Fordham Corporate Law Institute  
New York, New York**

**October 23, 2003**

## **I. Introduction**

Good afternoon. It is a privilege to participate in the Thirtieth Annual Conference on International Antitrust Law and Policy here at Fordham. I want to thank Barry Hawk. I also want to extend my gratitude to Fordham and our moderators, Professor Mark Patterson, John Temple Lang, and Professor Franklin Fisher for continuing this important forum for the exchange of international competition views. This conference is truly an institution, and I look forward to a lively and informative exchange with my fellow enforcers and friends, Philip, Ulf, and Sir Derek.

This afternoon I would like to offer a few thoughts on how we in the United States have attempted to enforce against anticompetitive single firm conduct without chilling vigorous and aggressive competitive behavior. In particular, I will focus on how a common law approach to antitrust has led us toward an objective, transparent, and economically based standard for assessing single firm conduct. It is the adaptability and incremental approach of case law that has enabled courts and enforcers over time to introduce rigorous economic analysis into antitrust law and to continue incorporating better economic thinking as it becomes available.

Of course, the case law approach to antitrust is not unique to the U.S. system. In the European Union, for example, a system with its roots in French civil law, decisions from the European Court of Justice and the Court of First Instance have been critical to the development of competition law. Some of my European colleagues from countries with civil law traditions may chafe at the comparison to a common law system. But irrespective of differing statutory mandates and legal traditions, experiential learning through case law is the best method to make our way through the Scylla and Charybdis of distinguishing

anticompetitive conduct from good, hard competition.

In the United States, we have struggled with this distinction since the enactment of the Sherman Act. The language of Section 2, our monopoly provision, suggests that mere possession of monopoly power does not violate the statute, an understanding confirmed in the famous case of *Standard Oil*.<sup>1</sup> It follows from *Standard Oil* that a violation requires some form of improper conduct in seeking, obtaining, or maintaining monopoly power. But the statute does not define what is improper. The law concerning what conduct is improper has evolved over time, as a result of changes in economic understanding of marketplace behavior, as the law increasingly relies on economic learning, and as judicial views change concerning the appropriate values to protect through antitrust law. These substantial changes in our understanding of the requirements of Section 2 have occurred despite the absence of any relevant change in the statute's language since the Sherman Act was enacted more than 100 years ago.

To illustrate this point, consider Judge Hand's famous opinion in the *Alcoa* case.<sup>2</sup> That opinion can be read to condemn virtually any conduct by a firm with monopoly power that has the effect of maintaining that monopoly, and it can be read to condemn any conduct in obtaining monopoly power if achievement of that power is not inadvertent. But our law has evolved from the *Alcoa* view that conduct was improper as long as monopoly maintenance or acquisition was its probable result—unless the defendant could show that the monopoly “was

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<sup>1</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>2</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

thrust upon it”—to the modern view that even deliberate conduct designed to acquire or maintain monopoly is insufficient if the conduct is not in itself exclusionary.<sup>3</sup>

In other areas as well, we have a rather narrower conception today of what conduct suffices to establish a Section 2 violation. Disciplined by a concern for economic efficiency, our Supreme Court has, in the pricing context, made clear that merely charging prices intentionally set so low so as to drive competitors out of the market will not, standing alone, constitute a violation. Prohibiting the practice, without more, may simply encourage inefficient firms to persist, deprive consumers of lower prices, and waste societal resources. Our Supreme Court has, with respect to activities other than pricing, similarly signaled the need for caution in defining conduct that establishes a violation of Section 2 by embedding a similar concern for economic efficiency into the relevant tests.

Such evolution is not unique to Section 2. In the merger context, for example, the Supreme Court moved from *Brown Shoe*, which interpreted the Clayton Act as prohibiting a merger that would have led to a post-merger market share of only five percent (5%) and to an equally slight increase in concentration in an otherwise unconcentrated market;<sup>4</sup> to *Philadelphia National Bank*, where the Court adopted a presumption of illegality based on market share and increases in concentration;<sup>5</sup> to *General Dynamics*, in which the Court allowed a merger leading to a twenty-two percent (22%) share of a concentrated market in

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<sup>3</sup> ABA Section of Antitrust Law, I *Antitrust Law Developments (Fifth)* 246-47, 250-52 (2002) (discussing this evolution).

<sup>4</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 343-44 (1962).

<sup>5</sup> *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); see also *United States v. Von's Grocery Co.*, 384 U.S. 270, 277-78 (1966) (prohibiting merger of third- and sixth-largest grocery chains that would have had only seven-percent (7%) market share); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552-53 (1966) (barring merger that would have led to 4.49% nationwide market share, because of the tendency toward concentration after a thirty-year decline in number of brewers).

which four firms would control seventy-five percent (75%) of current production and ten would control ninety-eight percent (98%).<sup>6</sup> These developments were not the result of any legislative changes, instead, by the time of *General Dynamics*, the Court had come to realize that the economic realities of a market are more important than bare statistics, and looked beyond the misleading data for current coal production to data for future supply capacity, which showed that the merged firm would have only a one-percent (1%) share because of low coal reserves that were fully committed.

The lesson is that legal systems that permit evolution through the development of precedent in case law, as both the U.S. and EU systems do, can transform their competition policy to reflect sound economic understanding as such understanding develops. Even high court precedents later realized to rest on unsound economics are not engraved in stone. A famous Oliver Wendell Holmes quote is applicable here: “The life of the law has not been logic: it has been experience.”<sup>7</sup> More than anything else, what we in the United States have to share with competition authorities in other nations is the cumulative experience of over a century of antitrust case law. A good place to begin is with a brief look at why single firm conduct, relative to other activities at issue in competition law, poses a special challenge for enforcers.

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<sup>6</sup> *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 502, 510-11 (1974).

<sup>7</sup> Oliver Wendell Holmes, *The Common Law* 1 (1881).

## **II. Single Firm Conduct on the Competitive Continuum**

The contours of U.S. antitrust law have been evolving over 110 years. Our understanding of what types of conduct should give rise to antitrust concern has changed as our tools of analysis have matured and incorporated continuously developing economic thinking. As a product of this evolution, a rough continuum has developed in the type of analysis that is required to assess the likely competitive effects of different categories of conduct.

The analysis of cartels and hard core price fixing falls at one end of the continuum. Such conduct is so clearly devoid of any efficiency enhancing potential that no inquiry is required to conclude that the conduct in question is anticompetitive. Under our system, such conduct will be condemned as “per se” illegal and subject to criminal penalties, including imprisonment.

In the middle of the continuum are mergers, joint ventures, and similar forms of competitor collaborations. The likely competitive effects of such conduct are not so readily apparent in certain instances. Nonetheless, over the years there has developed a sound, economically grounded, and highly principled framework of intensive review—forecasting both unilateral and coordinated effects of mergers and other combinations—which allows courts and enforcers to assess with some degree of confidence the likely competitive outcomes of these collaborations. This is not to say that merger analysis is free from controversy, but there is at least a broad consensus regarding the proper analytical tools to apply.

At the other end of the continuum is single firm conduct. Here, the most careful analysis is needed. It is with respect to this type of conduct that it may be most difficult to differentiate between healthy competition on the merits and harmful exclusionary conduct. It

is here where enforcers and courts run a significant risk of deterring hard yet legitimate competition. It is also an area in which, even if we are able to conclude that certain conduct is anticompetitive, it may be more difficult to effect workable remedies that will restore any lost competition.

With respect to single firm conduct, our Supreme Court instructs us that we must be humble about our ability to assess the competitive effects of such behavior, recognizing that a competitive outcome is often dictated by the operation of the market. Indeed, U.S. antitrust law has always tended to treat concerted action more severely than single firm conduct. This tendency results because even though concerted action can be efficiency enhancing, it also runs the risk of “depriv[ing] the marketplace of the independent centers of decision making that competition assumes and demands.”<sup>8</sup> In contrast, courts have come to apply Section 2 only in more narrowly limited circumstances and only in carefully measured ways.

Our Supreme Court has held that it is not “enough that a single firm appears to ‘restrain trade’ unreasonably, for even a vigorous competitor may leave that impression. . . . In part because it is sometimes too difficult to distinguish robust competition from conduct with long run anticompetitive effects, Congress authorized Sherman Act scrutiny of such firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.”<sup>9</sup>

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<sup>8</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

<sup>9</sup> *Copperweld*, 467 U.S. at 767-68.

Applying this standard is not without its difficulties. Judge Frank Easterbrook recently put the matter this way: “Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike.”<sup>10</sup>

Given the difficulties of distinguishing between competitive and aggressive conduct, should courts and enforcement agencies focus only on cartel and merger enforcement and look the other way when it comes to most forms of single firm conduct, as Judge Easterbrook also has suggested? No, not at all. Rather, as the Antitrust Division’s recent efforts in the *Microsoft* and *American Airlines* cases attest, we believe that courts and enforcers should be vigilant in taking action against anticompetitive single firm conduct.<sup>11</sup>

We also believe it is important, however, that the antitrust laws allow even dominant firms—many of which achieve their success due to superior production techniques, innovation, or management capabilities—to compete aggressively. To maintain this difficult balancing act, we have sought to apply standards of single firm conduct that are transparent, objective, and administrable, so that antitrust laws do not unduly interfere with the competition they are meant to protect. Our mission here derives from a synthesis of Section 2 case law, the more recent of which has embraced the critical role of economic analysis in the enforcement of the antitrust laws.

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<sup>10</sup> Frank H. Easterbrook, *When Is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Columbia Bus. L. Rev. 345, 345.

<sup>11</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), and *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

### **III. The U.S. Evolution Toward an Objective Standard for Single Firm Conduct**

Let us start with the *Alcoa* opinion in 1945. Judge Hand in that opinion stated a core maxim of American antitrust: “The successful competitor, having been urged to compete, must not be turned upon when he wins.”<sup>12</sup> I certainly agree with that proposition.

But in terms of the standard that was offered in *Alcoa*, where the company’s increase in productive capacity ahead of demand was found illegal, the court suggested that an antitrust violation might occur even where the enhancement of the market position of the dominant firm was simply the probable result of its conduct, without respect to whether that conduct was of a type that ought to be condemned on some objective basis. So in other words, if the conduct was intentional, and if it increased or enhanced the monopolist’s market position, then it might be wrongful even if the conduct was procompetitive and efficiency enhancing.

It is fair to say that while our statute has remained the same, this idea of liability for procompetitive conduct that happens to strengthen a monopolist’s position has been rejected. The Ninth Circuit said that this suggestion in the *Alcoa* opinion had been “questioned by just about everyone who has taken a close look.”<sup>13</sup> And so the modern view is that hard competition—even by monopolists—is prized, and instead of looking at how hard a firm competes, what we are trying to do is to identify the type of conduct that is anticompetitive.

The fundamental point is that the potential for causing harm through intervention is greater in the single firm context. Practical problems of enforcement may also mean that tinkering with the engine of economic output in order to try to get a few more horsepower may

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<sup>12</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

<sup>13</sup> *United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990).

not really be worth the effort and may be counterproductive. So, stated another way, we have moved toward an emphasis on the notion that we protect competition not competitors, that we do not protect the inefficient competitor from competition, and that legal standards must be fashioned to avoid the risk that intervention *harms* competition.

Nonetheless, there persists in some quarters uncomfortable with discussing more objective modes of decision making a fondness for what might be called antitrust sloganeering. We are all familiar with some of the slogans that are bandied about: Has someone cut off the oxygen from a competitor? Have they had the rug pulled out from under them? Has the playing field been made something other than level? Is competition other than on the merits? I am certainly in favor of oxygen and level playing fields and people having rugs, but it is not evident to me how these turns of phrase help in advising a business how to comply with the law. This is especially important in the single firm area, where, after all, the business is not even able to avoid liability simply by avoiding agreement with anyone, which is a safe harbor under Section 1.

At the Division, we have sought to distill the general principles regarding freedom to compete into an administrable standard. For this purpose, we have looked to the clearest statements in our Supreme Court's Section 2 jurisprudence. The Supreme Court has held that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."<sup>14</sup>

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<sup>14</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), citing Robert Bork, *The Antitrust Paradox* 138 (1978).

Following this line of antitrust jurisprudence in determining whether conduct is predatory, the Division has found it useful in many contexts to ask whether the conduct would make economic sense for the defendant but for its elimination or lessening of competition. It is a standard that we have advocated in several recent enforcement actions, including the *Microsoft* and *American Airlines* cases, and as *amicus curiae* in a recent Supreme Court case, *Verizon v. Trinko*.<sup>15</sup> In applying this standard, we do not mean to suggest that it necessarily encompasses every type of conduct that may violate Section 2 of the Sherman Act. The all-purpose, one-sentence, universal test for Section 2 liability is a “holy grail” that may never be precisely located. We do believe, however, that this test sets forth a more objective, transparent, and economically based framework for assessing single firm conduct.

#### **IV. U.S. and EU Enforcement in the Single Firm Arena**

From a big picture perspective, there is much more that unites U.S. and EU law in the area of single firm conduct than divides it.

Section 2 of the Sherman Act sets forth the U.S. rule in monopoly cases in deceptively simple language: “Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .”<sup>16</sup> Section 2 prohibits “monopolization” and “attempts to monopolize” and has left to the U.S. courts the task of elaborating on both concepts.

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<sup>15</sup> *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko*, No. 02-682 (U.S. Sup. Ct. argued Oct. 14, 2003).

<sup>16</sup> 15 U.S.C. § 2.

The EU's antitrust provision applicable to single firm behavior, Article 82 of the European Treaty, is much more specific about the kinds of actions that might be considered an "abuse of a dominant position," although it is similarly silent about exactly what it takes to be "dominant":

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Nonetheless, there are many similarities between the U.S. concept of "monopoly power" and the EU concept of "dominance." Delineation of the "relevant market" for purposes of assessing monopoly power or dominance is an established process, and the results of this analysis in the United States and European Union rarely diverge.<sup>17</sup>

The classic legal definition of "monopoly power" is "the power to control prices or exclude competition."<sup>18</sup> In recent years, lower courts have moved toward a more precise definition more closely tied to the economic concept of monopoly power: "a firm is a

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<sup>17</sup> See *DOJ/FTC Horizontal Merger Guidelines*, and *European Commission Notice on the Definition of the Relevant Market for Purposes of Community Competition Law*.

<sup>18</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1977).

monopolist if it can profitably raise prices substantially above the competitive level,”<sup>19</sup> that is, if it has significant market power.

The generally cited definition of “dominance” under EU law is “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.”<sup>20</sup> One respected treatise defines dominance in terms similar to the U.S. concept of monopoly power: “dominance is said to exist only when the situation of substantial market share together with pricing above cost is expected to be sustained over a period of time during which incumbents and entrants cannot be expected to bid away the dominant firm’s market share through lower pricing and superior quality products.”<sup>21</sup>

There has been considerable convergence in the analysis of market power. United States and EU authorities usually come to the same result in defining markets and deciding when potentially troublesome market power is at issue. The market share threshold for monopoly, however, is generally viewed as higher in the United States (greater than 60 or 70 percent) than the comparable market share threshold for dominance in the European Union, where enduring market shares of over 50 percent are strong *prima facie* evidence of dominance.<sup>22</sup> Still, in both systems, size or power alone is not illegal. The challenged firm

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<sup>19</sup> *Microsoft*, 253 F.3d at 50.

<sup>20</sup> *United Brands v. Comm’n*, Case 27/76, [1978] ECR 207, 277; [1978] 1 CMLR 429, 486.

<sup>21</sup> *The EC Law of Competition* ¶ 1.155 (Jonathan Faull & Ali Nikpay eds., 1999) [hereinafter Faull & Nikpay].

<sup>22</sup> Faull & Nikpay at ¶ 3.39.

must have engaged in certain monopolistic or anticompetitive conduct, and some monopolies will escape condemnation because they were a consequence of success in the market, untainted by impermissible conduct. Notably, in the EU system, the prohibition applies not to dominance, but to *abuse of dominance*.

This is a critical commonality. If, in Judge Hand's terms, the successful competitor were to be turned upon by the law when he won, the system would have a built-in disincentive to vigorous competition. Firms would be practically forced to cede market share, or to cease innovating, or otherwise to turn sluggish, just to avoid being penalized under Section 2 or Article 82. Such an outcome would plainly work against the entire premise of the market system, under which winners are rewarded, and the profits they generate in turn may attract new entry into the industry. Thus, the law should not intervene against even a monopolist *if* its position was legitimately obtained and maintained. On the other hand, the existence of significant market power coupled with different kinds of exclusionary or anticompetitive conduct can and should be prohibited by law because monopolies can harm economic welfare.<sup>23</sup>

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<sup>23</sup> It is important to note that Article 82 has occasionally been used as a broad prohibition of conduct by a dominant firm that violates non-competition related objectives. The EU has always relied on its competition rules to promote the economic integration of its internal market, for example, in its strict prohibition of vertical restraints that segment the EU market along national boundaries. In another example, in its 1999 decision in the *1998 Football World Cup* case, the European Commission held that discrimination on the basis of nationality by a dominant firm selling tickets does not fall outside the scope of Article 82, "notwithstanding the absence of any effect on the structure of competition." Case IV/36.888 - *1998 Football World Cup*, Commission decision of July 20, 1999, O.J. L 5/55 (Jan. 8, 2000) ¶ 100. There is obviously no parallel in Section 2 jurisprudence.

Another difference between Article 82 and Section 2 concerns “exploitative” abuses. Article 82 prohibits “imposing unfair purchase or selling prices or unfair trading conditions” by a dominant firm. United States courts have concluded that the decision to charge a monopoly price is not anticompetitive and therefore not a violation of Section 2. Indeed, the high price may serve as a signal in the market that invites new entry, and it is not clear that the best policy outcome would be to invite the monopolist to engage in “limit pricing,” or pricing at a level just high enough to preclude new entry. Theoretically, this may be one of the most important differences between Article 82 and Section 2. As a practical matter, however, the EU has not pursued the high price aspect of the prohibition against unfair selling prices, and thus the actual differences are not as great as they might seem. The rare excessive pricing cases that the EU has pursued in the last few years have been part of broader enforcement actions directed primarily at otherwise exclusionary practices by the dominant firm.

In the more “traditional antitrust” area, Article 82 imposes a “special responsibility” on a dominant firm “not to allow its conduct to impair undistorted competition.”<sup>24</sup> As the European Court of Justice held in *Hoffmann-La Roche*:

The concept of an abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions or commercial operators, has the effect of hindering the maintenance or the degree of competition still existing in the market or the growth of that competition.<sup>25</sup>

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<sup>24</sup> *Nederlandsche Baden-Industrie Michelin NV v. Comm’n*, Case 322/81, [1983] ECR 3461; [1985] 1 CMLR 282.

<sup>25</sup> *Hoffmann-LaRoche & Co. AG v. Comm’n*, Case 85/76, [1979] ECR 461, 486; [1979] 3 CMLR 211, 290.

The EU's focus on the dominant firm's "special responsibility" and responsibility to "maintain the degree of competition" has in several areas placed greater constraints on the firm's behavior than would be the case in a Section 2 analysis. It may be useful to consider how some of these differences play out in four areas: duties to assist competitors, so-called "monopoly leveraging," predation, and practices like bundled pricing and fidelity discounts.

#### **A. Duties to Assist Competitors**

"Essential facilities" is a key topic for exploring EU and U.S. approaches. This has been particularly true in the area of intellectual property, which John Temple Lang discusses at length in his paper, raising interesting questions.<sup>26</sup> Mario Monti has been quoted as saying in one speech that "it could be said that in the 90ies the essential facilities doctrine has been one of the US's most successful exports to the European Union."<sup>27</sup> If so, then it has been more successful as an export than at home. In a recent review my staff undertook of ninety cases with essential facilities claims that had been filed over the last five years, we found the vast majority of those were dismissed on the pleadings, and not a single final judgment in the plaintiffs' favor on this theory.

United States case law holds that "a firm with lawful monopoly power has no general duty to help its competitors."<sup>28</sup> Nevertheless, some U.S. courts have used the so-called "essential facilities doctrine" to define circumstances in which a duty to assist competitors might be found. In these cases, courts have insisted that the facility truly be essential for

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<sup>26</sup> See generally John Temple Lang, *Anticompetitive Non-Pricing Abuses Under European and National Antitrust Law* (paper presented at the Fordham Conference, New York City, Oct. 23-24, 2003).

<sup>27</sup> "Antitrust in the US and Europe: a History of Convergence," speech of Commissioner Mario Monti, Nov. 14, 2001.

<sup>28</sup> *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986).

competition in the relevant market,<sup>29</sup> and not merely convenient for competitors that prefer to free ride off of the investments of rivals. But courts have not been as clear about what constitutes a “facility” for the purposes of this doctrine, or about the terms on which access must be provided. Moreover, although the essential facility theory has been accepted by some lower courts, and rejected by others, the Supreme Court has not endorsed it.<sup>30</sup>

In *Trinko*, which was argued just last week, our Supreme Court has an opportunity to address the issue. The Second Circuit held in *Trinko* that a customer of AT&T’s local phone service may have stated an antitrust claim for monopolization under Section 2 by alleging that Verizon had not fulfilled its contractual duties to AT&T, Verizon’s competitor, as derived from the Telecommunications Act of 1996. While the antitrust laws provide a general framework for the protection of competition, the 1996 Act—in order to change the competitive structure of the telecommunications industry—imposes detailed duties on incumbent U.S. local-exchange carriers to share their facilities with newly entering rivals on terms almost always certain to generate lower revenue than the incumbents could otherwise earn. It is important to note that the current structure of the telecommunications industry addressed by the 1996 Act is in part a product of the 1982 consent decree that settled the United States’ antitrust suit against AT&T, leading to a break up of that former national, government-sanctioned monopolist.

In *Trinko*, the United States and the FTC jointly filed an amicus brief urging the Court

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<sup>29</sup> See, e.g., *Alaska Airlines v. United Airlines*, 948 F.2d 536, 544–45 (9th Cir. 1991) (noting that control of an essential facility “carries with it the power to *eliminate* competition in the downstream market”); 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 773b1, at 199 (stating that an essential facility is one “vital to the plaintiff’s competitive viability”).

<sup>30</sup> See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985).

to grant certiorari on Verizon’s appeal from the Second Circuit decision, and once the Court accepted the case, an amicus brief on the merits in support of Verizon. As we stated in our brief in support of certiorari: “The 1996 Act’s imposition of new duties to assist rivals—coupled with the increasing number of antitrust lawsuits predicated on the alleged noncompliance with the 1996 Act—have given new urgency to careful examination of the circumstances under which *antitrust law* requires a dominant firm to provide such assistance.”<sup>31</sup> In particular, the 1996 Act “require[s] incumbent local-exchange carriers to share their own facilities and services on terms agreed upon with new entrants . . . .”<sup>32</sup> Notably, however, the 1996 Act also includes an antitrust savings clause, providing that “nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”<sup>33</sup>

In upholding the plaintiff’s claim that Verizon may have violated Section 2 by failing to meet the standards for assisting competitors imposed by the 1996 Act, the Second Circuit relied on the essential facilities doctrine, holding that a monopolist has a duty to provide rivals with reasonable access to facilities that the monopolist controls without which one cannot compete—imposing such duty regardless of whether the monopolist could earn more selling such services at a monopoly price. The court also held that the plaintiff may have stated a claim under the questionable theory of monopoly leveraging, which I will turn to shortly.

Regarding essential facilities, we argued that the Second Circuit’s decision dramatically expands antitrust liability for failure to assist rivals and, in doing so, that it

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<sup>31</sup> Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko*, No. 02-682 (docketed U.S. Sup. Ct. Dec. 13, 2002).

<sup>32</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002).

<sup>33</sup> 47 U.S.C. § 152 note.

conflicts with the law of other circuits.<sup>34</sup> In our view, the essential facilities doctrine cannot serve as a stand-alone basis for Section 2 liability because, so applied, the doctrine imposes duties on rivals without requiring that the challenged firm’s conduct be exclusionary or predatory—i.e., that the refusal to deal or assist not make economic sense except as an effort to diminish competition. As we argued in our brief: “Unlike the 1996 Act, the Sherman Act does not impose a duty to sell to rivals in an evenhanded fashion unless the refusal is predatory or exclusionary, *i.e.*, unless the refusal represents a *sacrifice* of profit or goodwill that makes sense only because it has the effect of injuring competition.”<sup>35</sup>

As one court has explained, the essential facilities doctrine is “a label that may aid in the analysis of a monopoly claim, not a statement of a separate violation of law.”<sup>36</sup> As with any other monopolization or attempted monopolization claim, essential facilities claims must include some showing of exclusionary or predatory conduct—i.e., conduct that would not make sense but for its tendency to reduce or eliminate competition. Black-letter law in the United States holds that lawfully acquired monopoly power may be freely exploited by charging monopoly prices. This tenet is one of the hallmarks of our brand of competition policy and a key feature that distinguishes it from economic regulation. Imposing a duty to deal should not change this bedrock principle. Ulf’s characterization of a duty to deal as “an

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<sup>34</sup> The Second Circuit declined to follow the Seventh Circuit’s decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), upon which the district court in *Trinko* had relied in dismissing the plaintiff’s claim.

<sup>35</sup> Brief for the United States and Federal Trade Commission as Amici Curiae, *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko*, No. 02-682 (docketed U.S. Sup. Ct. May 23, 2003).

<sup>36</sup> *Viacom Int’l, Inc. v. Time Inc.*, 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992).

alien element to the market economy” is well put.<sup>37</sup>

Despite the difficulties presented in *Trinko* by the Second Circuit’s improper importation of duties from the Telecommunications Act into Section 2 of the Sherman Act, *Trinko* illustrates an important point about the role of industry-specific law in dealing with lawful monopolists. As a leading legislator in support of the 1996 Act noted, the statute “is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out . . . .”<sup>38</sup> Because sound antitrust analysis is bound by the principles that monopoly in itself is not illegal and monopolists not engaged in predatory conduct should be allowed to enjoy monopoly profits, general antitrust principles may be unable to reach specific monopolists that legislators and policymakers wish to uproot despite the absence of illegal conduct. This was the scenario in *Trinko*, and it seems equally applicable to lawful monopolists in other settings that exist, for example, by virtue of privatization of state-owned enterprises.

The interesting question here is to what extent de-monopolization is a task that is better handled by special purpose regulatory regimes with experts who can be involved in the rate-setting and access questions involved? Or, to what extent—because of fears of agency capture or other concerns—is this a task that general purpose antitrust enforcers ought to feel that they should take on? We argued in *Trinko* that the duties of assistance imposed by the

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<sup>37</sup> Ulf Boge, *Dominant Firm Behavior Under German Competition Law*, at 6-7 (paper presented at the Fordham Conference, New York City, Oct. 23-24, 2003).

<sup>38</sup> *Verizon Communications*, 535 U.S. at 488 (quoting 141 Cong. Rec. 15572 (1995) (Remarks of Sen. Breaux (La.))).

Telecommunications Act demonstrated Congress's recognition that the antitrust laws did not provide such duties and would not enable the competitive changes Congress desired. Altering the general principles governing single firm conduct with a punish-the-winners approach is a perilous course that courts should not pursue. We hope in *Trinko* not necessarily that essential facilities be abandoned outright as a way of approaching market entry situations, but rather that it be made clear that an essential facilities theory cannot serve as a stand-alone offense, that conduct that is exclusionary under Section 2 must still be found.

There are at least two reasons for not imposing a duty to deal or essential facilities liability outside of legislatively identified contexts. First, courts are ill-equipped to act as regulatory agencies either with respect to the setting of prices, or with respect to resolving inevitable disputes over the timeliness or quality of service. Second, denying a legal monopolist the ability to charge monopoly prices may significantly undermine incentives to make the risky investments that eventually may become essential facilities. The core message of antitrust laws and competition policies is that all firms should compete against one another, not that they should cooperate or share monopolies.

"Essential facilities" is also a timely topic in the EU. The European Commission announced in August that it was no longer seeking interim measures against IMS Health in the Commission's long-running abuse of dominance case involving the copyrighted "brick structure" for collection and sale of pharmaceutical sales data in Germany.<sup>39</sup> The European Court of Justice suspended the execution of the Commission's interim measures,<sup>40</sup> and the

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<sup>39</sup> European Commission Press Release IP/03/1159 of August 13, 2003.

<sup>40</sup> Order of the President of the European Court of Justice in *NDC Health GmbH & Co. KG and NDC Health Corporation/European Commission and IMS Health Inc.*, Case C-481/01 P(R), April 11, 2002.

Commission has yet to issue its final decision on the merits. The most recent development in this matter is the opinion of the Advocate-General in the related case referred to the European courts by a German court in copyright infringement litigation between IMS and its competitor, NDC.

The Advocate-General concluded that a refusal to license an intellectual property right (IPR) can be an abuse where there is no “objective justification” for the refusal and use of the IPR is essential for development of a derivative market, with the consequence that all competition would be eliminated in that market. The licensee, however, may not merely reproduce goods or services already produced by the IPR holder, but must be seeking to market products with different characteristics that, while they may compete with the IPR holder’s goods, meet other discrete demands by consumers not satisfied by the IPR holder’s products.<sup>41</sup> We are waiting with considerable interest to see whether the Court of Justice will reaffirm the support for the essential facilities theory that it demonstrated in the *Magill* case, in which the court ordered television stations in Ireland to license their program listings to a competitor that sought to create a single guide for all channels.<sup>42</sup>

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<sup>41</sup> *IMS Health GmbH & Co. OHG/NDC Health GmbH & Co. KG*, Case C-418/01, Opinion of Advocate-General Tizzano, October 2, 2003.

<sup>42</sup> *Radio Telefis Eireann v. Comm’n*, Cases 241 & 242/91P, [1995] ECR I-743; [1995] 4 CMLR 718

## **B. Monopoly Leveraging**

Monopoly leveraging likewise is a heading under which there has been a lot of discussion concerning single firm conduct. Again, Section 2 of the Sherman Act condemns neither monopoly itself nor the exploitation of monopoly power by raising price.<sup>43</sup> Rather, Section 2 condemns the use of monopoly power to preserve or enlarge a monopoly. These fundamental tenets of Section 2 jurisprudence are well known, but courts have at times endorsed a more expansive interpretation of Section 2 under the heading of “monopoly leveraging.”

The leveraging line of cases had its genesis in Justice Douglas’s 1948 *Griffith* opinion, which declared that “the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy competition, is unlawful.”<sup>44</sup> This dictum came to prominence three decades later in the Second Circuit’s *Berkey Photo* decision, which held that “a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market.”<sup>45</sup> Taken at face value, *Berkey Photo* may be understood to have created a Sherman Act offense found nowhere in the text of the statute. In 1993, however, the Supreme Court held in *Spectrum Sports* that Section 2 means what it says: “[T]he conduct of a single firm [is] unlawful only when it actually monopolizes or dangerously threatens to do so.”<sup>46</sup> Subsequent

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<sup>43</sup> See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979) (noting that a lawful monopolist is not “ordinarily precluded from charging as high a price for its product as the market will accept”).

<sup>44</sup> *United States v. Griffith*, 334 U.S. 100, 107 (1948).

<sup>45</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), citing *Griffith*.

<sup>46</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

Second Circuit decisions have greatly limited *Berkey*,<sup>47</sup> and other circuits have rejected it.<sup>48</sup>

In *Trinko*, the Second Circuit resurrected the monopoly leveraging theory as an alternative ground for Section 2 liability. The Second Circuit held that such a violation would be established if a monopolist in one market uses its monopoly to gain a “competitive advantage” in a second market. The court posited such liability even if the monopolist would not have a dangerous probability of successfully monopolizing the second market—as required by the Supreme Court’s decision in *Spectrum Sports*. We argued that the Second Circuit erred in allowing a theory of liability to go forward that lacked the critical element of danger of monopolization. We also argued that the leveraging theory as set forth in *Trinko* suffers from the same defect as the essential facilities rationale in that leveraging also does not require exclusionary or predatory conduct. We are hopeful that the Court’s decision in *Trinko* will put to rest the idea of monopoly leveraging as a free-standing basis for Section 2 liability.<sup>49</sup>

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<sup>47</sup> See *Virgin Atl. Airways Ltd. v. British Airways Plc*, 257 F.3d 256, 272 (2d Cir. 2001) (holding that a Section 2 violation requires “higher prices or reduced output or quality” in the second market); *AD/SAT v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999) (same); *Twin Labs., Inc. v. Weidner Health & Fitness*, 900 F.2d 566, 571 (2d Cir. 1990) (holding that a Section 2 violation requires a “tangible harm to competition” in the second market).

<sup>48</sup> See *Aquathem Indus. v. Fla. Power & Light Co.*, 145 F.3d 1258, 1262 (11th Cir. 1998); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 205-06 (3d Cir. 1992); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991). But see *Kerasotes Mich. Theatres, Inc. v. Nat’l Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988) (endorsing *Berkey*).

<sup>49</sup> Notably, the leveraging theory made a more short-lived appearance in the *Microsoft* case. The states’ original complaint contained a leveraging count predicated on *Berkey Photo*. Early on, Microsoft filed a motion for summary judgment in both the federal government’s case and the states’ case. The court granted the motions with respect to the leveraging count of the states’ complaint. *United States v. Microsoft Corp.*, 1998-2 Trade Cas. (CCH) ¶ 72,261, at 82,685-86 (D.D.C. 1998).

A form of monopoly leveraging argument appears to have stronger currency across the Atlantic. The European Court of Justice's *Tetra Pak* decision held that a firm dominant in one market could infringe Article 82 through conduct that both occurs in a second market in which it was not dominant and has any anticompetitive effects strictly in that second market. The court justified this decision on the basis that the two markets were linked, with the links being that the same equipment was used in both markets to supply the same customers.<sup>50</sup> But neither these links nor anything else in the court's opinion explains why the dominant position in the first market altered either the incentive or ability of the defendant to exclude competition in the second market. Rather, a firm's dominance in one market appears to have been the rationale for handicapping it in another. Like essential facilities, then, this is an area of the law in which the EU approach seems somewhat more conducive to government intervention.

### **C. Predation**

Taking away rivals' customers by offering a better bargain is a business practice with which enforcers rightly hesitate to interfere. Often, this simply means charging a lower price, although price, quality, and service may be combined in many ways to attract customers. Attracting customers by offering a better bargain than the other guy thus characterizes both predation and the legitimate competition on the merits that the antitrust laws are designed to promote. With so much in common, it is very easy to confuse the two.

To avoid such confusion, there has to be an objective standard for separating legitimate aggressive competition from impermissible predation. To establish predatory pricing, our Supreme Court's *Brooke Group* decision required proof that the predator lost money and that it had a reasonable prospect of recouping its losses through monopoly pricing after

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<sup>50</sup> *Tetra Pak Int'l SA v. Comm'n*, T-83/91, [1994] 2 ECR 755, [1997] 4 CMLR 726, ¶¶ 102-23, *aff'd*, C-333/94P, [1996] 1 ECR 5951, [1997] 4 CMLR 662, ¶¶ 34-62.

competition was excluded.<sup>51</sup> The second part of the standard is especially important because there are a variety of situations in which it can readily be determined that an alleged predator has no prospect of future monopoly pricing. An alleged predator might also show that it lost money for any of a variety of legitimate reasons. The Court's rationale for imposing rigorous requirements of proof in this area was that "the exclusionary effect of prices above a relevant measure of cost *either* reflects the lower cost structure of the alleged predator, and so represents competition on the merits, *or* is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting."<sup>52</sup>

In the Division's recent *American Airlines* case, we sought to define predation as aggressive conduct against business rivals that makes business sense only because of its potential to exclude competition and thereby generate monopoly profits.<sup>53</sup> We were unsuccessful in the case, and were accused by some of trying to move the law unduly in a more interventionist direction. We believed that the appropriate thing to do was to apply the test we advocated to an increment of business conduct that was meaningful to the defendant and upon which the defendant relied in making its own output decisions, rather than being constrained to apply the test to the entirety of the output in a particular market—in that case, the provision of air service in certain city pairs. We argued that the appropriate inquiry was whether incrementally added capacity was money losing, even if the service provided by the incumbent

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<sup>51</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-25 (1993).

<sup>52</sup> *Brooke Group*, 509 U.S. at 224.

<sup>53</sup> *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

airline as a whole remained profitable on the city pair as a whole. The Tenth Circuit held that even under the standard we advanced, we had failed to demonstrate that the additions of capacity at issue were money losing. Thus, although we lost the case, the issue of what increment of the market predation analysis should focus on remains unresolved.

Despite the result in *American Airlines* there are some positive aspects to the court's opinion. The court explained that past incredulity about predation stemmed largely from "the uncertainty of recouping losses" while "recent scholarship" has shown that predation can be profitable, "especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets."<sup>54</sup> The court's reliance on the latest economic scholarship demonstrates precisely the type of adaptability that I have been espousing.

Traditionally, predation law in the European Union has been more expansive than the U.S. approach. Under *Tetra Pak*, the test is not entirely objective because pricing above average-variable cost still may be deemed predatory if found to be "part of a plan for eliminating a competitor."<sup>55</sup> The European courts appear to have crafted the sort of intent-based test that some U.S. courts applied prior to *Brooke Group*.<sup>56</sup> In the United States, however, many sorts of intent evidence are now understood to be the legitimate expression of plans to compete aggressively and desires to succeed at the expense of rivals. As Judge Easterbrook explained: "Vigorous competitors intend to harm rivals, to do all the business if

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<sup>54</sup> *AMR Corp.*, 335 F.3d at 1115.

<sup>55</sup> *Tetra Pak Int'l SA v. Comm'n*, T-83/91, [1994] 2 ECR 755, [1997] 4 CMLR 726, ¶ 149, *aff'd*, C-333/94P, [1996] 1 ECR 5951, [1997] 4 CMLR 662, ¶¶ 73-75; *see also Akzo Chemie BV v. Comm'n*, C-62/86, [1991] 1 ECR 3359, [1993] 3 CMLR 215.

<sup>56</sup> *See, e.g., McGahee v. N. Propane Gas Co.*, 858 F.2d 1487, 1503 (11th Cir. 1988); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030-35 (9th Cir. 1981).

they can. To penalize this intent is to penalize competition.”<sup>57</sup> And as now-Justice Breyer wrote, “‘intent to harm’ without more offers too vague a standard in a world where executives may think no further than ‘Let’s get more business.’”<sup>58</sup>

European law also seems to depart from the more cautious approach of U.S. courts by not requiring evidence of a “reasonable possibility of subsequently recouping the losses deliberately incurred.”<sup>59</sup> This result is particularly noteworthy because it indicates a rejection of potentially procompetitive or otherwise innocent rationales for selling at a loss, for example, promotional efforts for a new product. Of course, promotional efforts of this type may in fact be a part of efforts to *increase* competition.

#### **D. Bundle Pricing and Fidelity Discounts**

A fourth category of single firm conduct, includes so-called bundling and fidelity discounts. For those of you who are interested in the topic, it has been the subject of an OECD Roundtable, which summarizes the various approaches in different jurisdictions in a way that may be very useful.<sup>60</sup> In general, we in the United States are certainly open to the possible procompetitive effects of bundled rebates, bundled pricing, fidelity discounts, whichever term you would like to use, and certainly not in favor of using *per se* rules to address this sort of

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<sup>57</sup> *Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986).

<sup>58</sup> *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983).

<sup>59</sup> *Tetra Pak Int’l SA v. Comm’n*, C-333/94P, [1996] 1 ECR 5951, [1997] 4 CMLR 662, ¶¶ 76-78.

<sup>60</sup> See OECD Roundtable on Loyalty or Fidelity Discounts and Rebates: Note by the United States (May 29, 2002); Note by the European Commission (May 23, 2002); and Background Paper by the Secretariat (May 17, 2002) [papers available at <http://www.oecd.org/dataoecd/18/27/2493106.pdf>].

conduct. Nonetheless, we recognize that there certainly are differences between this type of pricing mechanism and straight price cutting.

By bundling together either different products or multiple units of the same product, a firm with market power may be able to make offers on which it stands to make money, yet efficient rivals may not be able profitably to match or better these offers. At this level, such pricing systems work like predatory pricing: they take customers away from rivals by offering better bargains. But at another level, such pricing systems work quite differently than predatory pricing: while the pricing systems are structured as discounts or rebates, it is entirely possible that no customer ends up paying any less.

For that reason, it may be too broad to say that no antitrust concerns arise so long as any bundle is sold above the cost of that bundle. Some of these issues are presented in the pending petition for certiorari urging review of the Third Circuit's en banc decision in the *LePage's* case.<sup>61</sup> Because the Supreme Court has invited the views of the United States, it would be inappropriate to comment on the specifics of the case or the issues presented at this time. Obviously, it would be unlikely to see the United States advocating *per se* rules against all fidelity discounting or bundled pricing. In general, my view that Section 2 could benefit from trying to find rules that are more objective applies to this area of conduct as well.

There are several such rules that are currently out on the academic table for discussion: Should the rule be that a pricing scheme that excludes an equally efficient competitor should be unlawful? Should it be that in the case of a bundled discount, the discount for the whole bundle should be attributed to the product in which competition is alleged to be harmed?

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<sup>61</sup> *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

Another test that has been suggested is that you ought to be very suspicious that something is wrong if the competitor comes to the door with a case of the product and says, “Hello, I’d like to offer it to you for free,” and the customer says, “No, I would prefer not to take that product at a price of zero.” Some economists have suggested that such a scenario should be a strong indication of a problem with this sort of pricing scheme. These are only some examples of the emerging thinking in this area and in no way represent a forecast with respect to *LePage’s*.

As for the EU, it appears that fidelity discounts by dominant firms are essentially *per se* illegal.<sup>62</sup> Discounts offered by a dominant firm that are not equally available to all customers appear to be permitted only under strict cost justifications.<sup>63</sup> In *Irish Sugar*, the Court of First Instance found a fidelity discount to a single customer to be an abuse of dominant position because it was not an ordinary, volume discount open to all customers and had the effect of “recovering a customer who was inclined to switch to the competition.”<sup>64</sup> The court did not ask, as a U.S. court likely would, whether taking away this one customer posed any threat to the continued viability of the rival.<sup>65</sup>

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<sup>62</sup> *Irish Sugar plc v. Comm’n*, Case T-228/97, [1999] 2 ECR 2969, 5 CMLR 1300; *Nederlandsche Baden-Industrie Michelin NV v. Comm’n*, Case 322/81, [1983] ECR 3461, [1985] 1 CMLR 282; *Hoffman-La Roche & Co. AG v. Comm’n*, Case 85/76, [1979] ECR 461, [1979] 3 CMLR 211; *Virgin/British Airways*, Commission Decision, Case IV/D-2/34.780, OJ L030, [2000] 4 CMLR 999.

<sup>63</sup> See *Virgin/British Airways*, Commission Decision, Case IV/D-2/34.780, OJ L030, [2000] 4 CMLR 999, ¶ 101; Note by the European Commission, OECD Roundtable on Loyalty of Fidelity Discounts and Rebates ¶¶ 8–10 (May 23, 2002)

<sup>64</sup> *Irish Sugar plc v. Comm’n*, Case T-228/97, [1999] 2 ECR 2969, 5 CMLR 1300, ¶¶ 194–202.

<sup>65</sup> See *Morgan v. Ponder*, 892 F.2d 1355, 1362 (8th Cir. 1989) (“Courts have been wary of plaintiffs’ attempts to prove predatory pricing through evidence of a low price charged for a single product, or to a single customer. . . . [Cases involving below-cost pricing to just some customers focus on the basic question of whether the alleged predatory act poses a genuine threat to the *overall* competition.”).

Another notable case addressed British Airways's travel agent discounts, which were predicated on meeting or exceeding sales in the previous year. The Commission found these discounts to be abusive solely because they resulted in different commissions to different agents.<sup>66</sup> In a private suit in the United States on the same facts, the plaintiff failed to demonstrate to the satisfaction of the courts that the discounts had any effect on price or service or constituted predatory pricing.<sup>67</sup>

In a more recent case, the EU's Court of First Instance affirmed the Commission's 2001 decision fining Michelin over \$20 million for abuse of dominance in operating a fidelity rebate system for new and used, truck and bus tires.<sup>68</sup> The court based its decision on the long-standing EU jurisprudence that prohibits a dominant firm from granting fidelity rebates in exchange for a customer's agreement to acquire all or nearly all of its supplies from the dominant firm.<sup>69</sup> In response to Michelin's argument that the Commission had failed to analyze the effects of the challenged practices on competition in the relevant market, the Court of First Instance, citing the Court of Justice's predation standard from the *Akzo* case, held that for purposes of Article 82, proof of an anticompetitive objective and of an anticompetitive effect of a particular practice were the same: "[I]f it is demonstrated that the objective sought by the conduct of an enterprise in a dominant position is to restrain competition, that conduct

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<sup>66</sup> *Virgin/British Airways*, Commission Decision, Case IV/D-2/34.780, OJ L030, [2000] 4 CMLR 999, ¶¶ 108–11.

<sup>67</sup> *Virgin Atl. Airways Ltd. v. British Airways Plc*, 69 F. Supp. 571, *aff'd*, 257 F.3d 256, 266-72 (2d Cir. 2001).

<sup>68</sup> *Michelin/Commission*, T-203/01, September 30, 2003.

<sup>69</sup> *Id.* at ¶ 56.

will also be capable of having such an effect.”<sup>70</sup> Unfortunately, in my view, this substitution of intent for a thorough and concrete analysis of effect could have the potential to chill procompetitive conduct.

The bundling and fidelity rebate areas are among the murkiest regarding single firm conduct. Clarity will come, here as it has in other areas, from courts’ continued learning from economics as well as from the ongoing conversation between jurisdictions. To this end, our Economics Deputy, David Sibley, is overseeing the work of several Division economists who are trying to develop a better understanding and shed some light on the competitive effects of fidelity discounts and other forms of non-linear pricing. We will be announcing in the next few weeks a combined law and economics conference in which we plan to gather interested economists, academics, and members of the bar to discuss these issues.

## **V. Conclusion**

Let me close by just reiterating what I hope is not all that controversial a point in praise of the common law method. There is a lot of room for case-by-case development of competition law by the enforcement agencies and the courts in both systems as economic understanding develops. This is a source of strength in both systems. We do from time to time hear the hope expressed by those who believe that U.S. law should be more interventionist and less market oriented that perhaps statutory differences will cause the EC to believe it is *compelled* to diverge from U.S. approaches. I would suggest that this point is overblown.

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<sup>70</sup> *Id.* at ¶ 241 (unofficial translation).

Both systems leave much room for thoughtful development of the law. This may be true even on a basic question such as the scope of “exploitative” abuses. Looking at the text of Article 82, which forbids “directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions,” it is difficult to conclude that any particular definition of unfair pricing activity is compelled. Likewise many aspects of U.S. antitrust law are not compelled by the text of the Sherman Act.

My point is that in both systems, while there may be differences, the terms are sufficiently open that development of improved legal standards based on new experience and economic advances is not foreclosed. Rather, we have room to discuss important issues on the merits, taking advantage of the best economic thinking. Where economics leaves off, law and policy must take over, to craft *workable* rules or presumptions based on the likelihood that particular practices actually promote competition. With respect to single firm conduct, even by dominant firms, Learned Hand’s admonition must be taken to heart: “The successful competitor, having been urged to compete, must not be turned upon when he wins.”